

Unraveling the Rejection: The Google Book Settlement

An Online Seminar presented March 30, 2011

KENNEALLY: Well, thank you and welcome to Copyright Clearance Center's program entitled Unraveling the Rejection, a discussion of Judge Dennis Chin's March 22nd ruling on the Google Book Settlement. Hello. I'm Christopher Kenneally, director of author relations for Copyright Clearance Center.

Digitizing the books held in a number of large academic libraries throughout the United States. Over a decade ago, that was the idea of Larry Page, one of Google's two founders. Many thought the task impossible and the time it would take insurmountable, but Google found a way and plowed ahead. Google has now scanned nearly 15 million books, for the most part without the permission of the copyright holders.

The issue that brings us together today began as an uproar over what was called audacious copyright infringement and what Google defended as fair use. And thereby hangs a tale as well as a lawsuit.

Copyright Clearance Center has tracked this case, the Google Book Settlement, from the beginning, with the help of our expert, Lois Wasoff. If you'd like to retrace our steps going back to 2009, recordings of all the previous webinars are accessible on our website, www.copyright.com. If you are joining us for the first time today, though, we promise to bring you up to speed. We will provide you all the background you need to take full advantage of today's session.

And joining me now is Lois Wasoff. Lois, welcome again.

WASOFF: Thank you, Chris.

KENNEALLY: It's good to have you back here at CCC. Your extensive experience in copyright law and the publishing business really helps us sort out these complex legal matters. Let me again remind our audience that Lois Wasoff was past chair of the copyright committee at AAP and for many years, vice president and corporate counsel at Houghton Mifflin. She's also served on study groups that have looked at a variety of issues related to copyright law and libraries and is a frequent speaker in this country and abroad on issues related to copyright.

And all these issues are so important to us. You've been very valuable as a resource when it comes to understanding the complexities of the Google Book Settlement. And we certainly think we have in you the right person to help us today understand the implications of Judge Denny Chin's long-awaited opinion.

As always, we have a lot of information to cover in the hour ahead, but to begin, Lois, can you remind us of the core question before Judge Chin?

WASOFF: Yes, Chris, I can. I can easily do that because Judge Chin restates that core question right at the beginning of his opinion. He took more than a year from the date of the fairness hearing to actually issue the opinion, but the opinion itself doesn't keep us waiting for even a paragraph.

The question he restated as the core question that he had to decide was, is the plaintiff's motion for final approval of the class action that's set forth in the amended settlement agreement fair, adequate and reasonable?

And he immediately answers that question. Right at the beginning of the opinion, he states in no uncertain terms that it is not.

He also speaks about what he sees as the advantages of a universal digital library and he quite explicitly invites the parties to come back to him or come back to the court – we'll talk about that in a minute – with a revised settlement that uses an opt-in mechanism.

He structures his decision by reviewing the facts and prior proceedings. He describes the terms of the amended settlement agreement, the ASA, and then, quite eloquently, he gives voice to the nearly 500 submissions that were filed in connection with the review of the ASA. And I think it's only fair to note here that the vast majority of those submissions took the form of objections to the ASA.

He categorizes those objections into seven basic areas and then he summarizes the core issue that relates to each of those areas. In most cases, he gives us an indication of how his review of those objections influenced his ultimate decision.

He created a clearly written, well-reasoned decision that was obviously crafted to withstand the very high level of scrutiny to which he knew it was going to be subjected.

KENNEALLY: I agree with you about the ruling. It is very well-written, very carefully written, which is something, as an author, I appreciate myself. I've also followed the commentary that's come out in just the week since, and there's been a lot of speculation as to what's going to happen next. But, did you have any expectations about the way he was ultimately going to rule?

WASOFF: I think everybody following this case had their own expectations and the time gap between the fairness hearing and the opinion gave us all time to elaborate on those. During that interregnum, during that 13-month period, both the official and – as far as I know – the unofficial positions of the proponents of the settlement were that the settlement would ultimately be approved. It's quite understandable that they would feel that way given the enormous investment of time and money that each of the three proponents – the Association of American Publishers, the Authors Guild and Google – had made in the settlement.

But we also heard during that period from many other observers, including some who would have liked to see the ASA approved, who had less optimistic expectations. Many

commentators expressed the view that the settlement would not be approved because the objects were so many and so diverse. And many also speculated that if the judge in fact did approve it, his decision would be immediately appealed.

So, I certainly wasn't surprised to see this outcome and I think it will be extremely interesting to see what happens next.

KENNEALLY: Interesting, to say the least, I think. And just to ensure, though, that our audience has a better understanding of the events that brought us here together again today, can you briefly trace the milestones of this seven-year saga? The noted IP attorney Jonathan Band has called it the long and winding road of the Google Book Settlement.

WASOFF: It's been pretty long and it's been quite winding. In order to level-set a little bit here, we're going to have to go back to 2004.

It was in 2004 that Google announced that it had entered into agreements with several major research libraries. Under those agreements, the libraries had agreed to provide all or portions of their collections to Google for digitization. Since then, Google's digitized – the estimates run between 12 and 15 million books.

The scanning that was being done with the cooperation of the libraries was for the most part being done without permission from the copyright owners of those works that were still in copyright.

At the same time that Google was making this arrangement with the libraries, it also was actively promoting and signing major publishers to what they have subsequently come to call the Google Partner Program. Under that program, Google gets explicit permission from rights holders to scan works and use them in particular ways. Some of the works that were in the library collections are also covered in the Partner Program, so there's a certain overlap.

But what concerned the authors and the publishers in 2005 as the Google project began to really pick up steam, was the fact that much of the scanning was being done without permission from the copyright owners. Google's intention at that time, back in 2005, was to use these full-text scans in connection with search and then to make snippets available in search results. Google was also intending to provide copies of these full-text scans back to the libraries that had provided the works that were being scanned.

Google's defense of this action was that it constituted a fair use. The authors and the publishers profoundly disagreed. At the end of 2005, the authors and the publishers filed what were then separate copyright infringement actions. The authors' action was filed as a class action suit. The publishers' action was filed on behalf of certain individually names publishers.

Ultimately, those two cases were combined into a single case and they adopted the class action mechanism that had first been introduced by the authors.

KENNEALLY: Right. But on the original question of copyright infringement, the courts never ruled on that question, right?

WASOFF: That's absolutely correct. Before the court really had submitted to it in a way that would have committed it to rule, that underlying fair use question, whether Google's activities at that time were fair use under the Copyright Act, the parties began to negotiate a settlement. Those settlement negotiations began in the fall of 2006 and they continued until a settlement was announced in October of 2008.

But as I mentioned before, Chris, the parties in the course of the settlement negotiations, really, decided to adopt this class action mechanism that the authors had used when they brought their action. That had certain benefits because it permitted the settlement – in theory – to bind parties not specifically named before the court, parties that were represented by those who were before the court.

But it also meant that any settlement had to be approved by the court. And the court had to determine that the settlement was in fact fair and reasonable in order to give that approval.

The original settlement agreement that the parties submitted to the court in the fall of 2008 was given preliminary approval in November of 2008, but all that preliminary approval meant was that a process was now triggered by which the members of this putative class would receive notification of the settlement and would be given an opportunity to come forward if they had objections to the terms of the settlement.

And almost immediately, the objections began to pile in. It became very clear very quickly that without some dramatic modifications, the settlement as originally proposed would not be approved by the court.

So the parties went back to the negotiating table and in 2009, they worked on changes to the agreement that would address some of the concerns that had been raised by some of the objectors.

In November of 2009, a new settlement agreement, the amended settlement agreement, the ASA that was the subject of the court's actual ruling, was completed and it was submitted to the court with a motion for final approval. And again, a notice period was triggered and again members of the class were given an opportunity to come in with objections.

I should note here too that not only members of the class filed objections or comments, but the Department of Justice, representing the United States, came forward with comments and there were objections and comments filed from a wide variety of interested parties.

Now, the culmination of that notice and objection period in a class action suit is the fairness hearing. That's when the judge gets the opportunity to actually hear the proponents and, in this case, a subset of the objectors, and assess the formal presentation of the matter. That fairness hearing was held in February of 2010.

In the months preceding that hearing, it became very apparent that despite the efforts of the proponents in making changes to the settlement, they hadn't accomplished making the settlement a non-controversial document. Many written comments both in favor of and in opposition to the amended settlement agreement were filed. And again, it should be noted in fairness that there were many more objectors than supporters making filings.

The judge actually heard arguments at the fairness hearing and then he took the matter under advisement. And that's where things had been until last week.

Last week, 13 months after the fairness hearing, we were able to find out what the judge ultimately decided and review his opinion. And we now know that he's rejected the party's motion for approval of the ASA.

KENNEALLY: Right. That was the headline last week, and what we do know, though, is it's not over yet. So, you've brought us a kind of fast-forward through that seven-year journey that got us to the decision last week.

What's fascinating to me is to see the significant role that objectors played throughout the process. Everyone has an opinion, it seems, and the headlines in the past week since the ruling give an idea of the sharp divisions that characterize the case. Some characterize this as a mere speed bump for Google. Others have said it's a defeat, a bloody nose for Google and a victory for the copyright. But as I say, what's clear is that it isn't over yet.

Will you, then, Lois, delve into Judge Chin's opinion. Are there specific areas where the conclusions are relatively clear?

WASOFF: Judge Chin ruled very clearly on some issues, as if to just dismiss them from further consideration. There are some other issues on which he was less explicit and he used more descriptive language, terms like "troubling" or "substantial questions exist." And then there's a number of issues where he was clear that he wasn't reaching a final conclusion.

It's very interesting to read the decision. There are places where you read a portion of the decision and he makes his reasoning clear and then you expect that the next paragraph to begin with the words "I therefore hold" or "I conclude," and it doesn't. And I think that's by design.

My speculation is that he was leaving himself a certain amount of flexibility, a little bit of wiggle room should a revised settlement in fact reach his desk. I think he was careful not to paint himself into a corner in the way he framed this decision.

KENNEALLY: It was that deliberation, that deliberate way of addressing these questions, I suppose, that took him 13 months. So let's talk about those specific parts of the opinion where the judge did reach specific conclusions.

WASOFF: Sure. I think what we should start with is the scope of relief available under Rule 23. Let's go back for just a second. Rule 23 (e) of the Federal Rules of Civil Procedure is where the core requirements are set for the settlement of class action suits. That's where that fair and reasonable standard comes from. If the requirements of Rule 23 are not met, the judge does not have the authority to approve the settlement. The settlement cannot be approved. This is a gating issue.

There were many objectors to the ASA who cited what they saw as Rule 23 issues as their reasons for opposing the settlement. Ultimately, the judge agreed with some of those objectors, and this is the area where Judge Chin's ruling is particularly clear.

The ASA submitted – you'll recall, Chris – covered both past and future activities. It covered the scanning activities and the delivery of snippets that we have discussed that were the basis of the original complaints by the authors and the publishers. But it went much further. It also covered future activities. It included in effect a broad license to Google in exchange for certain payments to make future uses of those works that went far beyond the original uses that Google said it was contemplating at the time the action was brought.

Judge Chin indicated that a settlement that releases Google from past allegedly fringing (sp?) conduct could be approved. But because the ASA also authorizes future conduct, because in the judge's words, it transfers to Google certain rights in exchange for future and ongoing arrangements and releases Google from liability from those acts, he concluded very specifically that the second part of the ASA – that portion that contemplates an arrangement with respect to future activities – exceeds what the court may permit under Rule 23.

It's also in this part of the decision that the judge reaches another clear conclusion after comparing the acts complained about in the pleadings and the acts authorized by the settlement. Again, it relates to the past and future activities, but he's looking at this from a slightly different perspective now.

What the judge concluded was that the release claims would not come within the general scope made by the pleadings, that the release of future activity, of liability related to future activities, does not come within the scope of the pleadings. In the words of the case law here, the release future conduct didn't arise out of the identical, factual predicate. This is a very specific holding by the judge. It relates to Rule 23 and he left no doubt about how he concluded this issue should be decided.

KENNEALLY: Right. Well, having said that, that would have been enough to disapprove the ASA in itself, but Judge Chin went on to acknowledge other objections as well, right?

WASOFF: Yes, he absolutely did. He went on to discuss how his views on the other categories of objections that were filed were relevant to his ultimate decision.

One of the first issues he discussed was the adequacy of class representation. Now, he was very clear in the decision that his issue was not with the competence and experience of legal counsel. He was actually quite complimentary about the lawyers. He called them highly qualified and capable.

But he surmised from the nature of the objections that had been filed that there were troubling, antagonistic interests between members of the class, between and among members of the class. He noted that for example, objections had been filed by academic authors because, according to those objections, many of them have a primary interest in achieving broad dissemination of their works rather than remuneration for the dissemination of their works.

Insert authors were concerned. Foreign authors posed some very clear objections. He also cited some objections filed by certain authors who simply did not want their work digitized at all. On the basis of those objections, he concluded that the class plaintiffs had not adequately represented the interests of certain class members.

KENNEALLY: Well, this is a copyright case, Lois. What about the copyright concerns that were the subject of so many of the objections?

WASOFF: Those copyright concerns – you’re right, Chris – were the subject of multiple objections and commentary from outside the courtroom as well. Ultimately, Judge Chin concluded that those objections had merit. He went back to first principles. He cited Section 8 of the Constitution, the basis for copyright law. He cited the Copyright Act itself. He cited noted experts like Marybeth Peters and David Nimmer. And he discussed what he characterized as the statutory implication to the ASA.

So by copyright concerns here, we’re not talking about that fair use question. That’s still out there. We’re talking about the effect that the approval of this settlement agreement would have had on the question primarily of orphan works, though he also talked about a possible involuntary expropriation of copyrights under the ASA.

There were many objectors including Microsoft and Amazon who contended that by approving the ASA, the court would really be compromising what is rightfully a Congressional responsibility and a Congressional authority. And that’s because the ASA would have given Google rights to use and exploit commercially that range of orphans. That opt-out structure rather than the opt-in structure meant that Google was getting rights to use works that were not being affirmatively claimed by their rights holders. Google was getting the right to use works without explicit permission.

While acknowledging that orphan works present a real issue under copyright law, the judge concluded quite clearly that this issue, the orphan works issue, is one that really should be addressed by Congress.

KENNEALLY: I think that’s an important point, the relationship of copyright and Congress, there, Lois.

We're unraveling the rejection and taking a close look at Judge Chin's March 22 ruling on the Google Book Settlement case with Attorney Lois Wasoff brought to you by Copyright Clearance Center. My name is Chris Kenneally.

Lois, you just pointed out that Judge Chin suggested Congress was a better place to resolve the issue of orphan works rather than a class action settlement. Weren't there other issues that the court also felt would be better addressed by Congress?

WASOFF: Yes, definitely, Chris. Judge Chin also cited the international law concerns raised by some of the objectors as a reason why some of these issues really were a better subject for Congressional action, that some of these issues really should be resolved by Congress, not through private negotiation.

Even though the number of foreign works that were included in the settlement were significantly reduced between the original settlement and the ASA, in this objection period, foreign authors and publishers and in fact, a couple of foreign nations, remained concerned that their works would continue to be swept in, and they expressed very specific concerns that the ASA is a violation of international law.

KENNEALLY: Why is that? What were those specific concerns about international law?

WASOFF: There were various concerns expressed. One of the most oft-repeated ones was that the ASA would have required foreign authors to actually take affirmative action to prevent the use of their works by Google. Again, it's this opt-out versus opt-in dichotomy.

Judge Chin acknowledges it is a real concern. I want to be clear that he did not rule that the ASA is a violation of international law, but his belief that the concerns were significant clearly contributed to his ultimate determination.

KENNEALLY: When we first talked about the amended settlement agreement, we noted several objections that had garnered a great deal of attention, but interestingly, Judge Chin didn't focus on those in his opinion. Can you elaborate on what were some of those overlooked items?

WASOFF: I can, Chris, and they're important issues but we can move through quickly.

One of the major topics in the objections, one of the major topics of discussion were the antitrust considerations involved in the ASA. And again, this is an area where the judge did not rule that the ASA violated antitrust law. He noted that the ASA – and I'm going to use his words again here – would give Google a “de facto monopoly over unclaimed works.” He also noted – and again, these are his words – “Google's ability to deny competitors the ability to search orphan works would further entrench Google's market power in the online search market.” So he clearly saw antitrust issues, but he didn't specifically decide those issues one way or the other.

Privacy was another topic that was much discussed in the comments. Clearly, if the settlement had been approved, Google would have had a fairly clear window into what users look at, what kinds of materials users look at, how long they look at them, and there were a number of advocacy groups that really expressed concerns that the settlement did not include adequate privacy protections.

Judge Chin acknowledged this very simply. He said, yes, the privacy concerns are real. But he also made it clear that they weren't significant enough to reject the settlement on that basis alone.

And finally, he was actually quite clear in how he dealt with adequacy of notice and he put that one to bed. He simply said that the notice process for both the original settlement and for the ASA were adequate. So he ended that once and for all.

KENNEALLY: We're about halfway through our program, Lois, and you've really, I think, pretty thoroughly unpacked the details of the opinion and given us plenty of information about what Judge Chin has said and what the core issues are. But we're still left today with the dilemma to understand what the next steps could be. What exactly are the paths that this decision might take or might lead us to? What's possible or what's even likely?

WASOFF: OK. It's fascinating. It's interesting to try and look ahead and think about what might happen next.

The first and clearest path, in some ways, is that the parties could try to follow some of the suggestions that Judge Chin offered in his opinion, revise the settlement in the manner that he suggests, resubmit it and try to get it approved.

As we discussed, Chris, given the very carefully crafted nature of this opinion, he's left himself a certain amount of room, a certain amount of flexibility in reviewing a possible revised agreement. He did reach some very specific conclusions on the Rule 23 issues and made some strong suggestions on some of the other issues. Those would have to be addressed.

But he also made it very clear throughout the decision that he'd like to see a revised settlement. He discusses at some length that public policy favors a settlement of these kinds of actions, particularly that public policy favors a settlement of class action suits. That indication to come back to the court with another approach to these issues is really quite clear. I think he's expressed a preference that the parties come up with a settlement agreement that he feels he has the authority to approve under Rule 23.

We also should keep in mind here that because the agreement was disapproved, that the disapproval of the agreement does not end the case. To the contrary. The case is still pending. The litigation is still going on.

KENNEALLY: Right. Well, in fact, that leads us to an important question about some of the legal paths it might take. We can get back to the question of what a revised settlement

might look like, but first, sort of take us down those alternate paths. What would, for example, happen if litigation were to continue?

WASOFF: The parties could go back to the original question, essentially square one, and litigate on the original issues of fair use and copyright infringement. As we've discussed, this suit was originally brought by the publishers and the authors to challenge Google's scanning of books and Google's online display of snippets, its delivery of the full-text copies to the libraries. The legal issues around those activities have not been resolved.

Finally, it would relieve a lot of speculation about whether or not the judge's decision could be appealed, and there's been speculation about whether it can be appealed or it will be appealed.

Ordinarily, a decision other than a final decision in a case – what we call technically interlocutory decision – is not appealable as a right. It's appealable only if both the trial judge and the appellate court agree to permit the appeal. There are, however, some special rules that apply to class actions and in particular, to determinations that involve class certifications, and those special rules may apply here, and that would give the parties a right to appeal at least that portion of the decision that doesn't certify the class.

We're not hearing anything from the proponents so far about an appeal. And I actually think a more interesting question is whether or not, if there were to be an appeal either by right or by permission, whether that appeal would have any reasonable likelihood of success.

The judge really made only a few actual holdings in this decision, but they were tied clearly back to the key question of whether the Rule 23 standards were met. And those holdings were very carefully supported by the facts in the record.

I actually think that the chances of an appeal are very low and the chances of a successful appeal are even lower.

KENNEALLY: I guess that's a really important point for me – I'm not an attorney – because what you've been emphasizing throughout is the very deliberate way that Judge Chin put his decision together and I think it's been very helpful to hear all of that.

We're unraveling the rejection and taking a close look at Judge Denny Chin's March 22 ruling on the Google Book Settlement case here at Copyright Clearance Center. Joining me today is Attorney Lois Wasoff and my name is Chris Kenneally.

So, Lois, let's return to the possibility that the parties involved here – AAP, the Authors Guild and Google – might craft a revised settlement. Did the judge in his decision leave them anything like a roadmap to do that?

WASOFF: I don't think it would be fair to say that he made out a complete explicit roadmap. He didn't give them a checklist that they can simply follow to draft a new agreement. But

I think he certainly gave some very clear indications about how he thinks the parties should approach creating a revised settlement agreement. That's right in the language of the decision.

And he very definitely gave them one bright line that he wants them to think about. He stated unequivocally that many concerns would be ameliorated if the ASA were converted from an opt-out settlement to an opt-in settlement. In so many words, he's urging the parties to revise the ASA along those lines.

There's less absolute clarity about what the other provisions of a revised settlement might look like, but I think we can infer that there are certain other things that he would want to see in a revised agreement. We can infer that from the parts of the decision in which he discusses aspects of the ASA that he found to raise concerns or substantial questions, even if he didn't specifically hold that those concerns were significant enough to require him to disapprove the agreement.

What's interesting is that he, in this decision, immediately scheduled the status conference. He scheduled the status conference for April 25, 2011. He's giving the parties some time to analyze the decision, to review the suggestions that he's made about a revised agreement, and perhaps to begin discussing revisions in the agreement.

KENNEALLY: OK, so opt-out should be opt-in. But what are some other elements in a potential revised settlement that the judge would want to see?

WASOFF: Let's think about this now. Let's think about what the judge would accept as a settlement and let's keep that a little bit separate from the discussion of what the parties themselves would accept or even be interested in agreeing to ultimately. So, we'll focus now on what the judge was looking for. In my mind, there are at least two clear statements the judge is making about what a possible new agreement would include, and then there's some additional suggestions.

First, he's been very clear that a revised settlement would have to clearly distinguish between providing releases and payments for past activity and providing authorization for future activity. In his discussion of the Rule 23 issues and elsewhere in the opinion, he was explicit that it's the authorization of future uses of the works by Google, and by extension, the release of Google and others from liability for those future uses, that really place the ASA outside the scope of his authority.

Second – and we just saw that quote from the agreement – he was very clear that the use of an opt-out mechanism is problematic and that presumably, particularly in connection with those future uses, an opt-out mechanism will not pass muster. For Google to exploit works in the way that it had wanted to under the ASA – delivery of full text, the display uses in the original ASA formulations – Google, the judge is saying, will have to get an opt-in, will have to get affirmative consent from rights holders.

In effect, as I read this, I think the court is really endorsing the idea of a voluntary collective licensing model. According to the opinion, according to Judge Chin, that is what would be consistent with Rule 23, that is what would be consistent with existing copyright law.

Now, that kind of begs the question. Can any portion of the settlement be on an opt-out basis? Opt-out is the mechanism that is used in most class action settlements. That's the way class action settlements work. And the judge did specifically reject the complaints that had been made about the adequacy of notice.

But he also expressed concerns about the adequacy of class representation. So if the parties were prepared to address the questions of class representation, and if the only portion of the settlement that was on an opt-out basis has to do with past activities, I think the revised agreement could pass muster with the judge.

And finally, Chris, I think there are a couple of issues on which the judge didn't explicitly rule but where, in my view, he provided some pretty obvious hints to the parties about what he would like to see in a revised settlement. So in my view, I think the parties might want to very carefully consider Judge Chin's comments on privacy and on antitrust, perhaps by including more specific privacy safeguards in a revised settlement agreement and perhaps including provisions for more access on the part of third parties to the Google database. I think changes in those areas would probably help tip the balance.

KENNEALLY: But do we know if the parties themselves are even interested in entering into such a revised agreement, one that would create, as you said, a voluntary collective licensing model? After all, that would leave out orphan works from the settlement and that's a major issue for them.

WASOFF: That's an excellent question. I think that is the key question that we need to be thinking about right now as we're evaluating not just what a revised settlement might look like – let me put it differently.

We've been talking about a revised settlement agreement that the judge might be comfortable with, but you've just asked me about a revised settlement agreement that the parties might be comfortable with, and I think that's a very different question. Maybe we can try and tease out the answer to that by looking at some of the reactions we've been hearing from the proponents themselves.

KENNEALLY: Right. There's not a lot to go on, but there are some statements that each of them have made. Why don't we sort of run through those.

WASOFF: All the parties – all three proponents of the settlement, the two plaintiffs and the defendant – issued statements very promptly upon receiving Judge Chin's decision, as one would expect.

The Authors Guild gave very clear signals that they're interested in working on a revised agreement. They issued a statement through their current president, Scott Turow, and that statement said that the Authors Guild obviously would be studying the opinion. But it went on to say that the Authors Guild will talk with the other parties to arrive at a settlement that makes sense.

KENNEALLY: That's a quote, makes sense?

WASOFF: Makes sense. So, Chris, we know where the Authors Guild stands on this.

The Association of American Publishers is standing pretty firmly with the Authors Guild, at least on this basic question of is there interest in doing a revised settlement. On the day that Judge Chin's opinion was issued, John Sargent, who's the chief executive of Macmillan, issued a statement on behalf of AAP. And I think we should note here that John Sargent was an important negotiator in this process and one of the key players in the negotiation.

KENNEALLY: Really an architect, if you will.

WASOFF: That's probably a fair statement.

The John Sargent AAP statement made it very clear that although this is not the outcome that publishers were hoping for – they had been hoping for an approval – the publishers are prepared to enter into a narrower settlement and they do feel that the judge has given them some clear guidance into the ways they might have to change the existing agreement to make it acceptable to the court.

But Google has been far more inscrutable. Through their counsel, Hilary Ware, on the day of the settlement or the day after, Google issued a statement merely saying it was disappointed. They said they'd review the decision and consider their options. I'm not aware as we sit here that Google has made another public statement right now.

KENNEALLY: But still, let's indulge in a little learned speculation. You're certainly qualified for some of that and ask if you can read the tea leaves here. What do you think Google will do? Do you think they will have any interest in taking the time to once again revise the settlement or do you think they'll simply turn their sights and efforts elsewhere?

WASOFF: One of the major advantages to Google, the key benefit to Google all along in this settlement negotiation process and the long process of trying to get the court to approve the settlement and the use of the class action mechanism in the first place – one of the major advantages to Google was the orphan works piece. Google has always emphasized the need for completeness of its database and they can only accomplish that if the orphan works are included.

And Google really runs its business on an opt-out model. It's approached so many other issues in this way. Google will scan your website unless you put tags that tell it to stay

away. Its business model is very much an opt-out model rather than an opt-in model. So it's very possible that requiring Google to get affirmative opt-in for future uses will not, in Google's view, meet its business needs.

And you could also speculate that that opt-in model really wouldn't look that different from what they're doing now. They now offer the Google Partner Program, and if, Chris, you would like to have Google scan a book that you own the rights to and include it for certain uses, you can sign on on the Web and you can opt your book into the Google Partner Program.

Google also has in effect opt-in arrangements with major publishers, perhaps not as simple as the forms on the Web that come out of the Partner Program, but Google has negotiated agreements with many, many rights holders. So it's an interesting question.

And finally, I guess the last point I'd want to make is that the judge emphasized opt-in in this decision, and we're talking about the decision in this most recent event, and a critically important one. But the idea of using an opt-in rather than a opt-out mechanism is not a new idea in this litigation. The Justice Department included that suggestion in its comments on the original settlement agreement two years ago.

So the parties have had multiple opportunities to restructure the settlement in that way and chose not to. Whether the parties will approach this differently now now that the judge's voice has been added to the voice of the others urging the use of an opt-out mechanism, now that they will have to make some hard decisions about continuing this litigation if they don't include such a mechanism, I think all that remains to be seen.

KENNEALLY: Sitting across from you right now, Lois, I think that opt-in, opt-out is such a crucial point, not only in this case but in so much of what goes on online. As we've gone throughout all of this, there are many opinions in the case. Only one so far counts. That's Judge Chin's. He gave it last week on March 22. Can you tell us now, though, about some of the other reactions to the decision?

WASOFF: You and I are not the only two people who follow this closely and are fascinated by the developments by it. We have many compatriots in this. The reactions have been myriad, but I think there are a couple that we can highlight.

James Grimmelmann is a professor at New York Law School and he has done a masterful job in tracking the developments in this case and really staying on top of all of the changes that have occurred. He has published some comments that are quite interesting. He, as we've discussed, he believes that Judge Chin has refused to make new law here, has explicitly refused to make new law in his decision, on any issue except for Rule 23 intentionally, that he's trying to ensure that the decision has limited potential to be precedent-setting.

He went on to speculate that if a revised settlement were proposed that gives Google the right to scan and index the orphans but not use them for display usage, so maybe another

path this could take, according to Professor Grimmelmann, is permit sort of an opt-out structure but limit the uses to which the works are put, that that might be enough to get a settlement agreement over the hump of approval. So it's an interesting approach.

There was a very interesting article about five or six days ago in the *New York Times* by Claire Cain Miller. She looked at this from Google's perspective a little bit and what she was speculating was that Google may just take a new path here and take the battle from the courtroom to Congress. And this also follows on to what Judge Chin was saying when he talked about how the copyright issues in particular are a matter for Congress, not the courts. So she was suggesting that Google might actively begin to lobby for, to promote a law that would make orphan works readily available, basically change the copyright law.

Again, not a new concept. Both publisher and author groups have supported that effort in the past and there've been several attempts made in the last couple of years to pass orphan works legislation. Those attempts have so far failed, but perhaps Congress could be persuaded to address this issue now.

Siva Vaidhyanathan is a well-respected copyright expert. He authored a book called the *Googlization of Everything*. He wrote a very interesting piece in *Slate* online that talked about the case. He wrote with some admiration of what he described as Google's audacity in the scope of this project and in the interpretation of an application of the doctrine of fair use through its activities.

And he was suggesting that Google might take next steps based on this decision, might acknowledge that perhaps it had gone a little too far and take some lessons from this decision. So that was an interesting commentary.

And I guess the last one I wanted to really call out, because there have been many, is the op-ed piece that Robert Darnton published in the *New York Times* just about a week – a little less than a week ago, right after the decision came out. Robert Darnton is the director of the Harvard University library. He has written extensively on the Google Book Settlement, critically, to a large extent, because he has expressed some very specific concerns about concentrating this much power into a commercial entity. I think that's the graviment of his concerns about the Google Book Settlement.

But he's a major proponent of the establishment of a digital library, a national digital library. And he suggested that this may be an opportunity to revisit that question of the national digital library. He makes one specific suggestion that perhaps, since the estimate is that about two million of the scans in Google's database now are of public domain works for which there is no copyright issue, that those public domain scans could just be turned over to a foundation or a group that are trying to start a national digital library.

It's clear from the level of the response, Chris, that this case has retained, continues to retain, its fascination for many of us. I think it's going to be very interesting to see where this goes and I think there's going to be a lot more to keep us engaged, particularly as we approach and ultimately see what happens at the April 25 hearing.

KENNEALLY: Right. Well, clearly, no shortage of issues and questions to follow closely, and I just want to let you catch your breath, Lois. Thank you for that very thoughtful analysis. Remind everybody that this is a special program, Unraveling the Rejection, taking a look at Judge Chin's March 22 decision in the Google Book Settlement case, coming to you today from Copyright Clearance Center.

As we sort of pause and think about how this whole case has compelled authors and publishers in this country and around the world to think closely about a host of issues in new and even radical ways, we're sifting through some of the questions we've had from our own global audience. So let's turn to a few right now.

Has there been commentary from non-U.S. contingents regarding the rejection of the settlement?

WASOFF: I'm not aware of any specific or any formal comments from the original non-U.S. objectors, or even – I think there have been some informal comments and some broader comments from some of the foreign participants in the settlement.

But the commentary I have seen is on the impact that this rejection of the settlement could have on Google's non-U.S. ventures. As an example, a Google representative was asked right after the judge's opinion whether the rejection would delay the company's plan to set up an e-book retail presence in Canada. Google's also been actively lobbying in Great Britain for changes in the copyright law there. They submitted a brief to their commission that's considering changes to British copyright law and the brief talked about what Google saw as the certain restrictions that are currently on the books in the U.K.

It's an interesting concept. Here in the U.S., we have fair use. Fair use is the ultimate subject of this lawsuit. Fair use is not black and white. But it does function as a safety valve for certain kinds of uses, and you don't see fair use as a part of the copyright laws of other countries. And Google has complained that without that flexibility in a system, innovation can be stymied.

So we're seeing some impact on Google's activities overseas, but not a lot of commentary from non-U.S. objectors so far.

KENNEALLY: Right. Although I think the point is that although this is taking place in a courtroom in New York, the implications are really for the entire world.

WASOFF: Oh, without question.

KENNEALLY: Here's a question we have, which is, how could the original people – the parties involved here that negotiated the settlement – feel they could speak for all publishers? That's not only a legal question, but perhaps a philosophical one.

WASOFF: Yes, I suppose. It's interesting. We were just talking about the global implications of this, and I've actually had the opportunity to speak about the Google Book Settlement outside of the United States on a couple of occasions, and this is the issue that just gets the Europeans. They just don't get this.

We have in our jurisprudence the class action mechanism, and what the class action mechanism does is it says exactly what this question is questioning. It says there are certain circumstances where a group of named individuals has enough interests in common with a larger group of individuals so that it can act as the representative of that group.

So in a sense, it's an interesting question because in a sense, it really brings us back full circle to the Rule 23 issues that we talked about before. We have that class action mechanism. It permits representatives to act on behalf of the group. It permits representatives to act on behalf of individuals that are not actually before the court personally.

But it builds protections into that system by requiring that the class representatives adequately represent the class, by requiring that there be this identical factual predicate that is common to the various claims that could be asserted across the class.

So the answer is, as counterintuitive as it may seem, there is a mechanism in place. It is actually quite useful for resolving certain kinds of issues where each individual claim might not be substantial enough to justify a lawsuit, but in the aggregate, a great harm was done and needs to be addressed. So class action suits really have a purpose.

What the judge basically decided here was, is this particular case one in which that mechanism is appropriate? He didn't go so far as to say no, never. You can't use Rule 23, you can't use the class action mechanism here. What he did say is the particular settlement that's being proposed by these parties is not an appropriate use of that mechanism.

KENNEALLY: All right. Well, we've just got a few minutes left here, Lois, and here's a question about authors. What happens for authors who've already registered and not opted out? And I guess that goes as well for publishers. There was a great deal that we covered in previous programs about how one could respond if your works were in the database and so forth and so on. Where does Judge Chin's decision from last week leave those who did decide to participate?

WASOFF: Well, Google's sitting on a pretty valuable database right now. And it's an interesting question. We're going to have to see how this plays out. I don't have a bright line answer for this one yet, but I think it's a question we're all thinking about and we're going to need to find an answer to.

Every time you as an author or you as a publisher went to that Google Book Settlement website and claimed your works, you provided Google with some pretty valuable information, some pretty valuable metadata about who you are and what works you claimed and Google's got that information now.

Now, that information was supposed to be turned over to the Book Rights Registry, which was then going to use it to manage a database and to manage these rights and make sure that compensation was paid back. But the Book Rights Registry was entirely a creature of the amended settlement agreement. It was inchoate. It isn't fully formed. And it's a very interesting question about where that data is going to reside and who's going to own that information.

Right now, I think Google has gotten some benefit out of this case in this robust database that it's been able to generate.

KENNEALLY: A great answer and illuminating and important point and with implications for the future.

And with that last question, we will wrap up today's program, Unraveling the Rejection, Judge Chin Rules on the Google Book Settlement. Attorney Lois Wasoff, I want to thank you again for joining us and helping me and our audience to understand this important, complex issue.

WASOFF: Oh, thank you, Chris.

KENNEALLY: And for nonprofit Copyright Clearance Center, we're very pleased to bring you this special webinar as well as other educational programs on copyright throughout the year. For the latest schedule of events that we have ongoing, go to copyright.com and click on the tab for education.

For authors and publishers, CCC is your rights licensing expert. CCC's licensing services combined with Web-based applications and tools allow tens of millions of people worldwide in corporations, universities, law firms and government agencies to use and share published information with ease. Since its founding as a not-for-profit company in 1978, CCC has created and expanded markets and systems that facilitate content reuse and distribution of royalties to publishers and authors worldwide.

As a global licensing agent, Copyright Clearance Center currently manages over 350 million rights. We can help you understand how your works are being used and the value of your rights.

For all of us then at Copyright Clearance Center, this is Christopher Kenneally wishing everyone a great day.

END OF WEBINAR